MOTION FILED
JUL 15 1993

CASE NO. 92-2004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

vs.

HARRY C. DENUNE, et al.,

Respondents.

MOTION OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY THE STATE OF OHIO

AMICUS CURIAE BRIEF OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY THE STATE OF OHIO

STEVEN E. MARTIN
OHIO PROSECUTING ATTORNEYS ASSOCIATION
914 MAIN STREET, SUITE 300
CINCINNATI, OHIO 45202
(513) 632-6820

COURT INDEX PRESS, INC.-- 215 E. Ninth Street, Cincinnati, Ohio 45202 -- (513) 241-1450

BEST AVAILABLE COPY

CASE NO. 92-2004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

vs.

HARRY C. DENUNE, et al.,

Respondents.

MOTION OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY THE STATE OF OHIO

Pursuant to Rule 37.2 of the Rules of the Supreme Court, the Ohio Prosecuting Attorneys Association hereby requests that leave be granted to allow it to file an Amicus Curiae brief in support of the Petition for Writ of Certiorari filed herein by the State of Ohio. The Petitioner has consented to the filing of this brief. The Respondent has objected to the filing of this brief.

Steven E. Martin
Ohio Prosecuting Attorneys
Association
914 Main Street, Suite 300
Cincinnati, Ohio 45202

CASE NO. 92-2004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

vs.

HARRY C. DENUNE, et al.,

Respondents.

AMICUS CURIAE BRIEF OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED BY THE STATE OF OHIO

STEVEN E. MARTIN
OHIO PROSECUTING ATTORNEYS ASSOCIATION
914 MAIN STREET, SUITE 300
CINCINNATI, OHIO 45202
(513) 632-6820

QUESTIONS PRESENTED

I. WHETHER THE NECESSITY OF PREVENTING A RELEASE OF HAZARDOUS CHEMICALS INTO AN ENVIRONMENTALLY SENSITIVE AREA CONSTITUTES EXIGENT CIRCUMSTANCES WHICH AUTHORIZES A WARRANTLESS ENTRY.

II. WHETHER PROBABLE CAUSE FOR A WARRANTLESS ENTRY EXISTS, IF A STATE REGULATORY INSPECTOR HAS KNOWLEDGE THAT EVIDENCE OF CRIME "MAY", AS OPPOSED TO "WILL", BE PRESENT.

III. WHETHER KNOWLEDGE OBTAINED DURING A CONSENTUAL ENTRY CONDUCTED SUBSEQUENT TO A WARRANTLESS ENTRY OF AN ADJACENT LOCATION IS AN "INDEPENDENT SOURCE" UPON WHICH PROBABLE CAUSE FOR A LATER WARRANT MAY BE BASED.

IV. WHETHER AN INDIVIDUAL MAY ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED SOLELY UPON THE DEGREE OF OWNERSHIP AND CONTROL THE INDIVIDUAL HAS OVER THE CORPORATION, AND NOT THE PRIVACY INTEREST OF THE INDIVIDUAL IN THE PROPERTY SEIZED.

PARTIES TO THE PROCEEDINGS

The parties are the State of Ohio as the Petitioner; Harry C. Denune and Dixie Distribution, Inc., as Respondents. The Ohio Prosecuting Attorneys Association is filing an amicus brief in support of the Petition for Writ of Certiorari filed by the State of Ohio.

TABLE OF CONTENTS

	Page
QUESTIONS FOR REVIEW	III
PARTIES	IV
TABLE OF AUTHORITIES	VII
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT IN SUPPORT OF GRANTING CERTIORIARI	3
I. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT POTENTIAL INJURY TO THE ENVIRONMENT CONSTITUTES EXIGENT CIRCUMSTANCES WHICH AUTHORIZE A WARRANTLESS ENTRY	3
II. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT PROBABLE CAUSE FOR A WARRANTLESS ENTRY EXISTS, IF A STATE REGULATORY INSPECTOR HAS KNOWLEDGE THAT EVIDENCE OF CRIME "MAY", AS OPPOSED TO "WILL", BE PRESENT.	5
III. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT KNOWLEDGE OBTAINED DURING A CONSENTUAL ENTRY CONDUCTED SUBSEQUENT TO A WARRANTLESS ENTRY OF AN ADJACENT LOCATION IS AN "INDEPENDENT SOURCE" UPON WHICH PROBABLE CAUSE FOR A LATER WARRANT MAY BE BASED.	6

Page

IV. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT AN INDIVIDUAL MAY NOT ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED SOLELY UPON THE DEGREE OF OWNERSHIP AND CONTROL THE INDIVIDUAL HAS OVER THE CORPORATION, AND NOT THE PRIVACY INTEREST OF THE INDIVIDUAL IN THE PROPERTY SEIZED. 6

CONCLUSION 7

TABLE OF AUTHORITIES

CASES	Page
Brinegar v. *United States*, 338 U.S. 160 (1949)	5
Camara v. *Municipal Court*, 587 U.S. 523 (1967)	4
Illinois v. *Gates*, 462 U.S. 213 (1983)	5
Michigan v. *Tyler*, 436 U.S. 479 (1978)	3
United States v. *Al-Azzay*, 784 F.2d 890 (9th Cir. 1985)	4
United States v. *Lindsey*, 877 F.2d 777 (9th Cir. 1989)	3
United States v. *Williams*, 626 F.2d 697 (9th Cir. 1980)	4
United States v. *Zurosky*, 614 F.2d 779, 785 (1st Cir. 1979), *cert. denied*, U.S. 967 (1980)	3

CASE NO. 92-2004

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

vs.

HARRY C. DENUNE, et al.,

Respondents.

AMICUS CURIAE BRIEF OF THE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI FILED BY THE STATE OF OHIO

OPINIONS BELOW

The opinion of the Court of Appeals of Butler County in *State of Ohio* v. *Harry C. Denune, et al.*, Case Nos. CA90-07-128, CA90-07-129, CA Butler County (Opinion, 9/21/92), is reported as *State* v. *Denune* (1992), 82 Ohio App. 3d 497, and is reprinted at page A-2 of the Appendix to the brief filed herein by the Petitioner.

The Entry of the Ohio Supreme Court in Case No. 92-2281, *State* v. *Harry C. Denune, et al.*, (1/27/93) declining to review the case, is unreported and is reprinted at page A-1 of the Appendix to the brief filed herein by the Petitioner.

A subsequent Ohio Supreme Court entry (3/17/93) denying rehearing in the same case, is unreported and reprinted at page A-25 of the Appendix to the brief filed herein by the Petitioner.

JURISDICTION

The judgment of the State Court of Appeals, by 2-1 vote, reversing the Defendants' criminal convictions on the basis of the Fourth Amendment to the Constitution was entered on September 21, 1992. On January 27, 1993, the Ohio Supreme Court, by a 4-3 vote, denied the State's Motion for Leave to Appeal, holding there was no substantial constitutional question involved. A petition for rehearing, again by 4-3 vote, was denied on March 17, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The Ohio Prosecuting Attorneys Association adopts by reference the Statement of the Case as set forth in the brief previously filed herein by the Petitioner.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT POTENTIAL INJURY TO THE ENVIRONMENT CONSTITUTES AN EXIGENT CIRCUMSTANCE WHICH AUTHORIZES A WARRANTLESS ENTRY.

The prosecution of environmental crimes is, rightfully so, one of the pervasive trends in criminal law in America today. The decision of the Ohio Appellate Court in the case at bar needs to be reconsidered by this Court because it does not treat environmental crimes on an equal basis with more established crimes involving drugs, murder, etc. The Ohio Appellate Court, by its decision, holds State regulators and law enforcement officials enforcing environmental laws to a higher standard than those enforcing other criminal violations.

This Court has recognized that warrantless entries or searches are permissible in situations where an emergency exists which requires prompt and immediate action. *Michigan* v. *Tyler*, 436 U.S. 479 (1978). The Court has defined an exigent circumstance as one in which ". . . there is a compelling need for official action and no time to secure a warrant." Id. at 509. This Court has also allowed the use in criminal prosecutions of evidence visually observed as a result of a warrantless search or inspection that was initiated for emergency, non-criminal investigatory purposes. *United States v. Zurosky*, 614 F2d 779, 785 (1st Cir. 1979), cert. denied, 446 U.S. 967 (1980). This Court has even approved actions taken by law enforcement where there was a potential threat of harm. *United States* v. *Lindsey*, 877 F.2d 777, (9th Cir. 1989).

In the case at bar, Inspector Palmer's actions were not based upon any one fact. Inspector Palmer called upon his previous knowledge of the operations of Dixie Distributing, the anonymous tip which coincided with a scheduled inspec-

tion as well as his visual observations. He watched as a truck proceeded to a salvage yard in a floodplain near a wildlife refuge. There was ample testimony at trial that a PCB release to the environment at this location would be devastating and have a long-term negative impact to the area. There was literally no time to waste. All of this together constitutes an exigent circumstance justifying a warrantless search and prompt action.

Courts have repeatedly held that the possibility of explosives in an automobile constitutes an exigent circumstance justifying a warrantless search. *United States* v. *Al-Azzay*, 784 F.2d 890, (9th Cir. 1985); *United States* v. *Williams*, 626 F.2d 697 (9th Cir. 1980). This Court has held to avoid serious injury is justification for what might otherwise be illegal absent an exigency. *Camara* v. *Municipal Court*, 387 U.S. 523 (1967). This Court needs to affirm that the potential threat to the environment that presented itself in this case creates an exigent circumstance just as one was created in the foregoing line of cases.

Even though the foregoing facts and cases clearly state an exigent circumstance and an authority under law to act, Inspector Palmer went further, He contacted an employee of the salvage yard to request permission to inspect the trailers. The employee checked with his supervisor and gave permission. The Ohio Appellate Court said this was not enough consent. The Inspector is not under a legal duty to inquire as to the nature of the contract between a salvage yard and its customer. It is totally good faith to believe that if the salvage yard could not give permission pursuant to its contract with its customer for a search it would say so. Here explicit permission was given.

Upon inspection, Inspector Palmer found not the machines he had been told were in the truck but instead 10 transformers which usually contain PCB's and 1 55-gallon drum filled with an oily substance. There was also evidence that there were some leaks on the floor of the trailer but not to the environment.

Incredibly, the Ohio Appellate Court held since there was no leaking from the trailer, even though the trailer was in poor condition, an exigent circumstance was not created. The requirement of this case that some sort of actual, demonstrable environmental harm be occurring before an exigent circumstance is created is outrageous and contrary to law.

This court needs to address the issues in this case to make clear that environmental crimes are to be treated exactly like any other crime. Just as with explosives in an automobile, an exigent circumstance is created when PCB's are in a trailer that is in poor condition and located in a flood plain near a wildlife refuge. The potential injury to the environment, as demonstrated by the facts of this case, must be held to create an exigent circumstance justifying a warrantless search.

II. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT PROBALE CAUSE FOR A WARRANTLESS ENTRY EXISTS, IF A STATE REGULATORY INSPECTOR HAS KNOWLEDGE THAT EVIDENCE OF CRIME "MAY", AS OPPOSED TO "WILL", BE FOUND.

The determination that a probable cause for a warrantless entry exists has never been that a law enforcement officer or regulatory official is certain that a crime is presently or will shortly be occurring. The standard has always been that there is a fair probability that evidence of a crime will be found in a particular place. *Illinois* v. *Gates*, 462 U.S. 213, 238 (1983). This Court has previously noted that this difficult decision must be made in light of factual and practical considerations on the scene. *Brinegar* v. *United States*, 338 U.S. 160, 175 (1949).

The standard applied by the Ohio Appellate Court in this case is again one that requires "concrete" evidence that a

regulatory inspector is certain that a crime is about to occur. This is an unrealistic and inconsistent requirement established by the Ohio Appellate Court to apply to environmental cases. Again, this court needs to grant certiorari to emphasize that environmental cases are to be judged by the same standards as any other criminal case. If the decision of the Ohio Appellate Court is allowed to stand, it will be devastating to law enforcement. This decision is clearly at odds with the previous holdings of this Court.

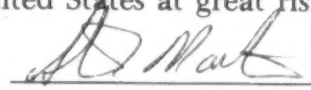
III. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT THE KNOWLEDGE OBTAINED DURING A CONSENTUAL ENTRY CONDUCTED SUBSEQUENT TO A WARRANTLESS ENTRY OF AN ADJACENT AREA IS AN "INDEPENDENT SOURCE" UPON WHICH PROBABLE CAUSE FOR A LATER WARRANT MAY BE BASED.

IV. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT AN INDIVIDUAL MAY NOT ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED SOLELY UPON THE DEGREE OF OWNERSHIP AND CONTROL THE INDIVIDUAL HAS OVER THE CORPORATION, AND NOT THE PRIVACY INTEREST OF THE INDIVIDUAL IN THE PROPERTY SEIZED.

The Ohio Prosecuting Attorneys Association incorporates by reference the arguments set forth by the Petitioner for Arguments III and IV.

CONCLUSION

This Court should grant certiorari in this case to demonstrate that environmental cases are not to be treated as second-class citizens in the criminal justice system of the United States. Those of us who prosecute environmental crimes want these offenses to be treated the same way any other criminal offense is treated. To do otherwise is violative of this Court's previous holdings and is tantamount to placing the citizens of the United States at great risk.



Steven E. Martin
Counsel for Amicus
The Ohio Prosecuting Attorneys Association
914 Main Street, Suite 300
Cincinnati, Ohio 45202
(513) 632-6820